Supreme Court, U. S.
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in the Supreme Court of the United States

NO. 75-150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ALFREDO FLORES, a/k/a ALI,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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of the
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NO. _____

UNITED STATES OF AMERICA,
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ALFREDO FLORES, a/k/a ALI,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I

Notice is hereby given that ALFREDO FLORES, Defendant-Appellant, hereby Petitions the SUPREME COURT OF THE UNITED STATES for a WRIT OF CERTIORARI on a Final Order of the UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, in the Case of UNITED STATES OF AMERICA vs. ANTONIO QUESADA, ALFREDO FLORES, a/k/a ALI, MARITZA

BREZOT; Case Number 74-2881, Affirming the Judgment of Conviction; said Decision having been entered May 7, 1975. Copy of said Opinion is hereto attached in the Appendix as Exhibit "A".

This PETITION FOR WRIT OF CERTIORARI is made pursuant to 28 USC 1254 (1).

II

The Questions presented for review are as follows:

1. Did the Court acquire jurisdiction of Defendant-Appellant, ALFREDO FLORES, unlawfully through the conduct of United States Drug Agents, who kidnapped him in Venezuela and abducted him to the United States for the purpose of prosecuting him here; making the entire proceedings in the United States District Court void?

2. Was Defendant-Appellant, ALFREDO FLORES, substantially prejudiced and deprived of a fair trial by reason of the Prosecutor conversing with, coaching, and preparing an essential Prosecution witness during his appearance on the Witness Stand, while Cross-Examination was proceeding; following which the Witness testified falsely and the Prosecutor failed and deliberately chose not to bring the knowing false testimony of a material nature to the attention of the Jury?

III

The Constitutional Provisions, Treaties, and Statutes which are involved in this Case are listed below and are more fully set forth in the Appendix as Exhibit "B":

UNITED STATES CONSTITUTION

Fourth and Fifth Amendments

UNITED NATIONS CHARTER

Article 2, Paragraph 4

ORGANIZATION OF AMERICAN STATES CHARTER

Article 17

Article 20

IV

STATEMENT OF THE CASE

On October 18, 1973, FLORES, together with Defendants, BREZOT and QUESADA, were indicted at Miami, Florida for violation of Title 21, U. S. Code, Section 173 and 174, charging a conspiracy with intent to receive, buy, and sell narcotics during 1968 and 1969. Pursuant to the Indictment, FLORES, a citizen of Venezuela, was arrested on May 16, 1974 in Venezuela and was immediately transported by a U. S. Drug Agent to Puerto Rico for a Removal Hearing which was held on May 28, 1974 before a United States Magistrate. At said Hearing, FLORES was ordered removed to Miami, Florida. On May 29, 1975, FLORES was arraigned at Miami and entered a Plea of Not Guilty. Trial date was set for and commenced on July 1, 1974 and continued until July 3, 1974, at which time the Jury found all Defendants Guilty as charged, on July 3, 1974, FLORES was sentenced to fifteen (15) years imprisonment.

On July 8, 1974, FLORES filed a Motion for New Trial, which was denied by the Trial Court on July 12, 1974.

Notice of Appeal was filed by FLORES on July 10, 1974, following which, on July 23, 1974, FLORES was delivered to the U. S. Penitentiary in Atlanta, Georgia, where he is now confined.

Argument was had before the United States Court of Appeals for the Fifth Circuit and a Decision was rendered on May 7, 1975 Affirming the Conviction and Sentence of the United States District Court for the Southern District of Florida.

STATEMENT OF THE FACTS

U. S. Drug Agents, working with the U. S. Attorney in Miami, Florida, were looking around South America for Alfredo Flores to get him into the United States, legally or otherwise.

According to the testimony by Government witnesses at the Removal Hearing of May 28, 1974 at San Juan, Puerto Rico, the U. S. Drug Enforcement Administration Agent in charge of this case, Agent Knight, talked to "cooperating individuals" about Alfredo Flores "at least 30" times during and after the Federal Grand Jury investigation (REMOVAL TR 20 & 23). The same Agent also testified that the U. S. Attorney handling the case in Miami wanted Flores "brought to the United States" as soon as the Removal Hearing was over (REMOVAL TR 25).

The second U. S. D. E. A. Agent to testify in Puerto Rico, Agent Jorge, stated that Flores was met by this Agent at the San Juan Airport on a Pan Am plane arriving from Venezuela, "together with two gentlemen", one of whom was a "fellow worker from the Federal Bureau of Narcotics" named Guzman and the Agent for the Government of Venezuela named Gonzalez (REMOVAL TR 30-31). Agent Jorge further admitted that he was at the Airport "following the instructions of my supervisor", and that he had a Warrant of Arrest for Flores, and he was told what flight to look for and that Agents Guzman and Gonzalez would also arrive on that flight. In fact, he testified that the two agents were physically next to Flores and that their purpose of being on that flight was to accompany Flores "here until I arrested him", (REMOVAL TR 32 & 40).

Agent Jorge also revealed that he was the one who took Flores' passport from him and "gave it directly to the immigration officer", (REMOVAL TR 34 & 38).

Further, Agent Jorge admitted that the two accompanying agents "came with Mr. Flores from Venezuela" (REMOVAL TR 42); and that these agents pointed out Flores to him when he went onto the plane to make the arrest (REMOVAL TR 48); and, that Agent Jorge "knew they were coming with Mr. Flores and I was going to arrest that Mr. Flores,' ('REMOVAL TR 43).

Finally, and most importantly, Agent Jorge testified that he knew Flores was accompanied by the two agents on the Pan Am plane from Venezuela to Puerto Rico not of his own free will "because Mr. Flores demonstrated that he was not in Puerto Rico because of his will, he did not

want to be here, he was not happy to be here in Puerto Rico", (REMOVAL TR 43); on the contrary, (REMOVAL TR 47) shows that Flores had in his possession at the time of his arrest an ALM Antillean Airlines ticket registered on May 13, 1974 reflecting a round-trip flight from Curacao to Venezuela and from Venezuela back to Curacao.

The foregoing Government testimony has been corroborated and enlarged by the four-page Affidavit and Offer to Prove of Flores, which has been made a part of this Record on Appeal in order to fully apprise this Court of the factual basis of the events leading up to the Removal Hearing of May 28, 1974. Essentially, Mr. Flores swears that while waiting to board an ALM plane in Venezuela for return to Curacao, he was detained by Venezuelan Policemen for over a day and then was forcibly placed aboard a Pan Am World Airway plane by a U. S. Drug Agent and a Venezuelan Policeman who then accompanied him to Puerto Rico while he was handcuffed; thereafter, he was arrested in Puerto Rico by Agent Jorge and was searched and deprived of all documents and personal belongings following which he was incarcerated until the Removal Hearing of May 28, 1974.

At said Removal Hearing, Flores petitioned and moved the Court to Quash all proceedings "because of unlawful conduct by Government officers . . . " and because, "this Removal Hearing is against all of the due processes of law doctrines". (REMOVAL TR 3-4). The U. S. Magistrate thereupon denied the Motion to Quash and commenced the Removal Hearing, the Magistrate observing that, "the method in which the Defendant was arrested is irrelevant at this time in these proceedings . . ." (REMOVAL TR 11).

Trial on the Indictment commenced in Miami, Florida on July 1, 1974 and two witnesses testified for the Government, to-wit: Carlos Inchaustegui and Felix Olivera. Following the direct testimony of Olivera, he was cross-examined by counsel for Defendant, Brezot, after which there was a short recess before commencement of further examination by counsel for Defendant Flores. During the recess, counsel for Flores observed and partially overheard Witness Olivera and the Prosecutor discussing the facts regarding the case. (TR 180). Flores' counsel then moved to strike the testimony of Olivera (TR 181), in response to which the Prosecutor, Miss Atkinson, did admit talking to the witness during the recess and advised him about "the trap that Mr. Garber laid for him," that he should answer certain questions in a certain way, that she would "ask him other questions on re-direct at a later time". Also, she did not see anything wrong in saying that to him at that time. (TR 181-182).

The Trial Court thereupon commented that it was improper (TR 182), and he warned, "you cannot talk to witnesses who are on the Stand and giving them instructions. You cannot coach him, . . . " even about the trap (TR 183). However, the Trial Court did not construe this error as "being serious enough for warranting a mistrial and striking of the testimony and starting the case over again. The Fifth Circuit may look at it in a different light. We may be trying the case over again but there is no apology necessary . . . ." (TR 184).

Following this exchange, counsel for Flores did cross-examine Government witness Olivera. At TR 198, Olivera admitted talking to the Prosecutor during the recess, but at TR 199, he could not remember the Prosecutor telling

him that the Defense attorneys might be attempting to trap him. In fact, on the next page, TR 200, Olivera answered, "It's important, but I don't remember her using the word "trap". When asked how did she put it, he then responded, "she did not put it to me in any way". Then, Olivera denied that Miss Atkinson told him to be careful of certain things he was saying and that the entire conversation between those two during the recess had been about previous statements he had given to the authorities and that she had told him, "Don't be nervous, you are doing good". (TR 200). The prosecutor did not correct this perjury.

Thereafter, on redirect of Olivera by Miss Atkinson, at TR 209, she commenced to ask the witness the questions that she had told him during the recess she would ask on redirect and Olivera answered those questions as she had instructed him to do. (TR 209-210).

Following this testimony, defense counsel moved to strike the testimony in its entirety of the witness Olivera on the grounds of the differences of the Testimony of the Witness Olivera and the representation by the Prosecutor concerning the conversation between the two during the recess (TR 211, 214-216). The Motion was denied. (TR 216).

It was during the Argument of the preceding Motion to Strike that the Trial Court instructed other potential witnesses as to whom they could or could not talk to during the Trial. The Trial Court advised that they could talk to the lawyers, but "They may not talk to you while you are on the witness stand during a recess, ..." (TR 212).

V

THE QUESTIONS PRESENTED FOR REVIEW ARE SUBSTANTIAL FEDERAL QUESTIONS

Petitioner is of the firm conviction and belief that the questions presented for review in this proceeding involve substantial Federal issues regarding the United States Government and its standing in the international community as well as important issues of due process of law.

More specifically, it has been seen that in order to obtain jurisdiction over the person of ALFREDO FLORES the United States Government, acting through Federal Drug Agents and various "questionable" foreign agents, participated in an outright kidnapping of a foreign national for the purposes of bringing that foreign national to Trial within the territorial limits of the United States. Petitioner would respectfully submit that such actions are so abhorrent to the American Judicial System as to demand a decision by this Court as to the validity of the actions of the United States Government in this case.

More importantly, it appears on the face of the agreed upon facts that the United States violated the territorial rights of a foreign country, to-wit:

Venezuela in the capture and kidnapping of ALFREDO FLORES which, of course, would be in direct controvention of international law, the Organization of American States Charter and the United Nations Charter. Clearly there are judicial procedures for extradition of individuals accused of crimes in the United States. None of these were followed, or, even attempted in this instance.

The Fifth Circuit Court of Appeals in Affirming the Conviction and Sentence in effect condoned illegal kidnappings and abductions of foreign nationals without due process of law. Such a decision must be repugnant to the United States Constitution and the American Legal System.

It is important to note that never before has this Court been presented with the issue involving the kidnapping of a foreign national from his own country to the United States in order to permit him to be tried in the United States. This obviously makes this case one of first impression before this Court and therefore there is definitely a greater urgency in this Court accepting jurisdiction and determining this Point of Law.

Would the United States Government tolerate the kidnapping of an American Citizen who had committed a crime in a foreign country and sanction such a kidnapping by a foreign agent simply for the purpose of bringing an American citizen to Trial in that foreign country? Clearly I think the answer would be "no"; therefore, why should this Court condone such actions by United States Government Agents? Clearly this question is of such great magnitude and import as to constitute a mandate that this Court accept Certiorari and pass directly on this point.

Petitioner's second contention is that he was denied due process of law in the Trial Court when during a recess the United States Attorney openly discussed a witness' testimony while that witness was on the witness stand and in the middle of Defense Counsel's Cross-Examination. As the facts indicate, the United States Attorney was less than candid with the Court regarding her out of Court recess

discussion wit' the witness. The Witness, when questioned about the out of Court recess discussion, testified that he simply did not remember what the United States Attorney had said to him.

This question appears not to have been previously decided by any Federal Court directly. It is Petitioner's contention that this issue also presents a substantial Federal question regarding due process of law in that this case presents a blatant example of witness coaching, which is so incongruous with the due process clause and, therefore, it requires this Court to accept jurisdiction and to decide this issue on the merits and the law so as to provide the Courts of this Country with a definitive statement of the law regarding such behavior by attorneys and witnesses.

CONCLUSION

The conclusion of the Petitioner is that the facts involved in this case are of such a substantial federal nature as to require this Court to accept jurisdiction of all the issues involved and to decide once and for all the questions presented.

Respectfully submitted,

ELLIS RUBIN LAW OFFICES

By: _____
ELLIS S. RUBIN
Attorney for Defendant-Appellant Flores
265 Northeast 26th Terrace
Miami, Florida 33137

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the required number of copies of this Petition for Writ of Certiorari was mailed this ____ day of July, 1975 to the Clerk of the Supreme Court, Washington, D.C. and copies were also furnished to KAREN ATKINSON, Assistant U.S. Attorney.

_____
ELLIS S. RUBIN

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 74-2881.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Antonio QUESADA, Alfredo Flores,
a/k/a Ali and Maritza Brezot,
Defendants-Appellants.

May 7, 1975.

Defendants were convicted in the United States District Court for the Southern District of Florida, James Lawrence King, J., of conspiracy to receive, conceal, buy and sell unlawfully imported heroin, and they appealed. The Court of Appeals, Clark, Circuit Judge, held that defendant's allegation that he was kidnapped by government agents and brought into the United States did not defeat the district court's personal jurisdiction; that the evidence was sufficient to support the conviction; that the separate indictments of two coconspirators did not render said coconspirators unavailable to defendant as witnesses and did not bar use of their statements against defendant; and that defendants were not so prejudiced by the conduct of the Government's attorney in talking to a prosecution witness that a mistrial should have been declared or the witness' testimony stricken.

Affirmed.

1. Criminal Law —99

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, assertion that defendant was kidnapped by government agents and brought into United States could not defeat personal jurisdiction of district court, notwithstanding contention that kidnapping would violate defendant's right to be free of unlawful searches and seizures and right to due process. U.S.C.A. Const. Amends. 4, 5.

2. Conspiracy —47(12)

Evidence, including testimony that defendant referred to substance distributed by him as "very best" heroin, was sufficient to sustain conviction of conspiracy to receive, conceal, buy and sell unlawfully imported heroin. Narcotic Drugs Import and Export Act, § 2(b-d, f), 42 Stat. 596 as amended.

3. Conspiracy —47(12)

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, introduction of chemical analysis of substance is not essential to conviction and nature of substance as narcotic need not be proved by direct evidence if circumstantial evidence presented establishes that beyond reasonable doubt substance is heroin. Narcotic Drugs Import and Export Act, § 2(b-d, f), 42 Stat. 596 as amended.

4. Conspiracy —43(12)

In prosecution for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, evidence of overt act

committed by two coconspirators who were named in separate indictment was admissible, even though said overt act was not alleged in indictment of defendant.

5. Criminal Law —508(4)

In prosecution of defendant for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, fact that two coconspirators were indicted and tried separately did not demonstrate that they were unavailable to defendant as witnesses.

6. Criminal Law —422(1)

In prosecution of defendant for conspiracy to receive, conceal, buy and sell unlawfully imported heroin, statements of coconspirators were admissible against defendant even though they were indicted and tried separately.

7. Criminal Law —700

Where prosecutor at defendant's conspiracy trial admitted telling witness during recess that witness was doing good job and cautioned him not to fall into trap defense counsel was laying on cross-examination, fact that witness' recollection of conversation was somewhat different, in that he did not remember prosecutor cautioning him not to fall into trap, did not oblige prosecutor to correct "known false testimony" absent showing that prosecutor knew witness' statements were false.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Maritza Brezot, Antonio Quesada and Alfredo Flores were convicted of conspiracy to receive, conceal, buy and sell unlawfully imported heroin in violation of 21 U.S.C. §§ 173 and 174. Flores argues that because he was illegally kidnapped into the United States by federal agents the court does not have jurisdiction over him. Quesada argues that the evidence was insufficient to convict and that statements of coconspirators were erroneously admitted against him. All three appellants urge that the prosecutor erred in discussing the case with a witness during a recess which occurred while the witness was on cross examination. Finding no merit in these contentions, we affirm.

Appellant Flores, a Venezuelan, argues that the trial court lacked personal jurisdiction over him because he was kidnapped into this country from his homeland by federal agents. He first raised this issue of no jurisdiction at his removal hearing in Puerto Rico. His motion to quash was denied and he was ordered removed to Miami. He did not renew the motion before the trial court but that court granted his motion to supplement the record on appeal by filing the transcript of the removal hearing and his affidavit and offer to prove the kidnapping.

[1] In this court Flores contends that his forcible abduction by government agents violates the federal Kid-

napping Act, the treaty between the United States and Venezuela, and the Charter of the United Nations, thereby depriving him of due process and Fourth Amendment guarantees. In United States v. Winter, 509 F.2d 975 (5th Cir. 1975) and United States v. Herrera, 504 F.2d 859 (5th Cir. 1974), we considered contentions similar to those now being asserted by Flores, and held that under present Supreme Court decisions, as well as decisions of this court, these arguments lack merit. Frisbie v. Collins, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952); Ker v. Illinois, 119 U.S. 436, 444, 7 S.Ct. 225, 30 L.Ed. 421 (1886); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2nd Cir. 1975); United States v. Toscanino, 500 F.2d 267, reh. denied (2nd Cir. 1974); United States v. Caramian, 468 F.2d 1370, 1371 (5th Cir. 1972); United States v. Vicars, 467 F.2d 452, 455 (5th Cir. 1972).

[2] Appellant Quesada alleges there was insufficient evidence that the substance he was involved with and sold was in fact heroin or that he knew it to be such. The evidence shows, however, that during the course of two separate transactions in which Quesada was intimately involved the substance was continuously referred to as the "very best" heroin in his presence and described by him as heroin in his conversations with others. It was a white powder, on both occasions it was sold to him for 20,000 dollars per kilo (one thousand grams) and he resold it after the buyers tested it and pronounced it to be heroin for 22,000 dollars per kilo. The product never came into the possession of the government, so a specific assay was impossible.

[3] The introduction of a chemical analysis of the substance is not essential to conviction. United States v.

Graham, 464 F.2d 1073 (5th Cir. 1972). The nature of the substance as a narcotic need not be proved by direct evidence if the circumstantial evidence presented establishes, as it did here, that beyond a reasonable doubt the substance was heroin. E.g. United States v. Gregorio, 497 F.2d 1253, 1263 (4th Cir. 1974); United States v. Jones, 480 F.2d 954, 960 n. 4 (5th Cir. 1973), cert. denied, Stockmar v. United States, 414 U.S. 1071, 94 S.Ct. 582, 38 L.Ed.2d 476 (1974); United States v. Atkins, 473 F.2d 308, 314 (8th Cir. 1973), cert. denied, 412 U.S. 931, 93 S.Ct. 2751, 37 L.Ed.2d 160 (1974); United States v. Fantuzzi, 463 F.2d 683, 689 n. 7 (2nd Cir. 1972); United States v. Agueci, 310 F.2d 817, 828 (2nd Cir. 1962), cert. denied, 372 U.S. 959, 83 S.Ct. 1016, 10 L.Ed.2d 12 (1963); Toliver v. United States, 224 F.2d 742, 745 (9th Cir. 1955). The evidence also disclosed that Quesada helped others weigh and package the substance and thus had possession of the drug. In Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610, reh. denied, 397 U.S. 958, 90 S.Ct. 939, 25 L.Ed.2d 144 (1970), the Court held the government is entitled to an instruction that the jury may infer heroin which is within the United States was smuggled into the country and one who possesses heroin within the United States is charged with the knowledge that the drug was unlawfully imported. In addition to proof of constructive knowledge through possession, the government introduced testimony revealing that Quesada in fact had actual knowledge of the unlawful importation, i.e., testimony that in Quesada's presence Flores stated that he had brought the heroin from Lebanon. The sufficiency of the evidence adduced against Quesada meets the test of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941).

Appellant Quesada further argues that the government split its conspiracy indictments, naming the three appellants in one and two other coconspirators, Jose Avalos and Rudolfo Castrillon, in a separate indictment, and then proceeded to introduce testimony in the trial of Quesada implicating him in an overt act not alleged in the conspiracy indictment under which he was tried. The declarations complained of were made among Avalos, Castrillon and Inchaustegui and were related by Inchaustegui at his trial.

[4, 5] Quesada contends that the separate indictments of Avalos and Castrillon both rendered them unavailable to him as witnesses and constituted the conspiracy charged against them a separate conspiracy from that charged against Quesada and his codefendants, and thus created a single-multiple conspiracy variance between the charge laid and the proof. These contentions are specious. The evidence established that Avalos and Castrillon made a buy or heroin from Inchaustegui and Quesada during the course of the conspiracy charged to Quesada. That this overt act was the basis for a separate indictment against Avalos and Castrillon does not establish that the sale was not a part of a single heroin marketing conspiracy by Quesada and his codefendants. The proof shows it was. Nor does the fact that this sale was not alleged as an overt act in the indictment against the latter preclude proof of it at their trial. "We have held before that the government is not limited to overt acts pleaded in proving a conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy." United States v. Perez, 489 F.2d 51, 70 (5th Cir.), reh. denied, 488 F.2d 552 (5th Cir. 1973); accord, United States v. Ayres, 434 F.2d 60 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S.Ct. 930, 28 L.Ed2d 217 (1971); Reese v. United States,

353 F.2d 732 (5th Cir. 1965); Finley v. United States, 271 F.2d 777 (5th Cir. 1959), cert. denied, 362 U.S. 979, 80 S.Ct. 1065, 4 L.Ed.2d 1014 (1960). Moreover, the mere fact that Avalos and Castrillon were separately indicted and separately tried does not demonstrate that they were unavailable to him as witnesses.

[6] The proof furthermore established that Avalos and Castrillon were more than mere purchasers, they were shown to be actively engaged as coconspirators in the same conspiracy even though they were not named in the same indictment. Thus, their statements were admissible against Quesada.

[7] Finally, all three appellants argue that they were so prejudiced by the conduct of the government's attorney in talking to a witness that a mistrial should have been declared or the witness' testimony stricken. At trial a named but unindicted coconspirator, Carlos Inchaustegui, and a convicted narcotics violator, Felix Olivera, testified against appellants. While Olivera was on cross examination there was a recess during which he talked with the trial attorney representing the United States. A defense counsel observed this intercourse and protested to the trial judge. Upon subsequent questioning from the court concerning the substance of their conversation, the attorney stated she told Olivera he was doing a good job, and not to fall into the trap the defense was trying to lay for him in regard to a previous misdemeanor conviction. Defense counsel asked for a mistrial or, in the alternative, that Olivera's testimony be stricken. The court chastised the attorney but denied further relief. When Olivera's cross examination resumed he testified that he did not remember any mention of a trap. Citing Giglio v. United States,

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and United States v. Johnson, 487 F.2d 1318 (5th Cir. 1974), defendants contest the government's alleged failure to correct known false testimony, i.e., Olivera's statement that he did not remember the part about the trap.

Giglio and Johnson are inapposite. In the case at bar, the prosecutor had stated her recollection of the conversation before Olivera resumed his testimony. The defense used the information gained from this statement in their cross examination. Olivera's testimony as to his recollection of the same conversation, while different, was not shown to have been false. The government urges United States v. Burke, 495 F.2d 1226 (5th Cir. 1974) is applicable. In that case, where the trial court allowed the prosecutor to work with a witness over the weekend on his upcoming cross-examination, we held that in the absence of a showing of prejudice the error was not reversible. In the circumstances of the case at bar the result is the same. Assuming arguendo that the actions of the trial attorney were erroneous, they were unknowingly so and did not affect any substantial rights of the defendants. Such an error would not dictate reversal, Fed. R.Crim.P. 52(a).

The convictions appealed from are
Affirmed.

APPENDIX B

THE U.S. CONSTITUTION

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

UNITED NATIONS CONSTITUTIONAL DOCUMENTS

CHAPTER I. PURPOSES AND PRINCIPLES

Art. 2 §4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

CHAPTER IV.

ORGANIZATION OF AMERICAN STATES CONSTITUTIONAL DOCUMENTS

FUNDAMENTAL RIGHTS AND DUTIES OF STATES

Art. 17. Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States. International treaties and agreements should be public.

Art. 20. The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

Nos. 75-150 and 75-5046

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALFREDO FLORES, a/k/a ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ANTONIO QUESADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-150

ALFREDO FLORES, a/k/a ALI, PETITIONER

v.

UNITED STATES OF AMERICA

No 75-5046

ANTONIO QUESADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners Flores and Quesada and co-defendant Maritza Brezot were convicted of conspiracy to receive, conceal, buy and sell, and facilitate the transportation, concealment and sale of unlawfully imported heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. Petitioner Quesada was sentenced to six years' imprisonment; petitioner Flores was sentenced to 15 years' imprisonment. The court of appeals affirmed on May 7, 1975 (Flores Pet. App. A). Flores' petition for a writ of certiorari was not filed until July 28, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

The evidence revealed a conspiracy to sell illegally imported heroin and related to two separate transactions, each involving three kilos of contraband. In both instances the drugs were brought into the country by petitioner Flores and sold by Flores and Brezot to Inchaustegui and petitioner Quesada, who in turn sold them to Castrillon and Avalos.

1. Both petitioners contend (Flores Pet. 10-11; Quesada Pet. "B") that the district court erred in refusing to strike the testimony of Felix Olivera, a government witness. On direct examination, Olivera corroborated elements of the testimony of the government's chief witness, Inchaustegui, an unindicted co-conspirator. Upon completion of cross-examination of Olivera by counsel for defendant Brezot, Flores' counsel requested and was granted a short recess. During the recess, the witness talked with the prosecuting attorney. This conversation was observed by defense counsel and was called to the attention of the trial judge outside the presence of the jury. The prosecutor then informed the court that in their discussion, she had told Olivera that he was doing a fine job of testifying and that he was not required to admit to a prior misdemeanor conviction when asked if he had been convicted of any felonies. The trial court admonished the prosecutor for her behavior but denied defendants' motions for a mistrial or to strike the witness's testimony. When cross-examination resumed, defense counsel were permitted to utilize the prosecutor's recapitulation of the conversation as a predicate for questioning Olivera as to his recollection of its contents. At the conclusion of his testimony, the court denied defendants' motion that the testimony be stricken in its entirety.

There is no basis for petitioners' assertion that the prosecutor's conversation with the witness denied them a fair trial. No rule of law or canon of professional be-

havior forbids government counsel from talking with a government witness during a recess. *In re United States,* 286 F. 2d 556, 562 (C.A. 1), reversed on other grounds *sub nom. Fong Foo* v. *United States,* 369 U.S. 141. Absent a showing of deliberate prosecutorial misconduct amounting to subornation of perjury or failure to correct knowingly false testimony, the district court properly denied petitioners' motions.[1]

Petitioner Flores also contends (Flores Pet. 8) without supporting argument that the prosecutor deliberately chose not to bring knowing false testimony by Olivera to the attention of the jury. The witness testified that in his conversation with the prosecutor, he remembered no mention of a "trap" being set for him concerning his prior misdemeanor convictions, although the prosecutor had used that term in recapitulating their conversation for the court. Defense counsel were aware that his testimony differed in this particular from the prosecutor's version of the conversation and thus had full opportunity for cross-examination on the point. Under the circumstances, it can hardly be said that the prosecutor failed to expose false testimony. Furthermore, no implication of knowing falsity arises from the differing recollections of the phrasing of the conversation; since the matter was one as to which the witness had no motive to lie, it seems certain that nothing more than a difference in recollection was involved. Finally, the precise wording of the warning

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[1]Upon becoming aware of the possible impropriety of her action, the prosecutor immediately conveyed her recollection of the substance of the conversation to defense counsel. Counsel were at liberty to use both the existence of the contact and the knowledge thus obtained to attack Olivera's credibility before the jury. Counsel for petitioner Flores cross-examined the witness at some length concerning the subjects covered in the conversation. The remedial measures adopted by the district court therefore prevented any prejudice from befalling the petitioners, so that, in any event, the prosecutor's conduct cannot constitute reversible error. See *United States* v. *Burke,* 495 F.2d 1226 (C.A. 5).

to a corroborative witness to distinguish between his past misdemeanor and felony convictions is wholly immaterial to the issue of petitioner's guilt or innocence. Under the foregoing circumstances, *Giglio* v. *United States,* 405 U.S. 150, is entirely inapplicable.

2. Petitioner Quesada contends (Quesada Pet. "A") that his conviction should be reversed because there was insufficient evidence that the substance involved in the conspiratorial transactions was in fact heroin. The product never came into the possession of the government; introduction of a chemical analysis at trial was therefore impossible. But the prosecution can establish that the substance sold was heroin without introducing the contraband when other reliable evidence is proferred which establishes its nature. *United States* v. *Graham,* 464 F. 2d 1073 (C.A. 5). Lacking the physical evidence, the prosecution can prove this element of the crime by circumstantial evidence. *United States* v. *Jones,* 480 F. 2d 954 (C.A. 5). Petitioner's contention would improperly limit the government's enforcement efforts to those instances in which the drug distributors were arrested while in possession of the contraband.

As summarized by the court below (Flores Pet. App. 5-6), sufficient circumstantial evidence was introduced to establish beyond a reasonable doubt that the substance sold by the defendants was heroin. See *Glasser* v. *United States,* 315 U.S. 60, 80. Petitioner's argument (Quesada Pet. 1) that the ruling below is in direct conflict with the decision in *United States* v. *Graham, supra,* is therefore inaccurate.

3. Petitioner Quesada contends (Quesada Pet. "C") that Inchaustegui, the chief prosecution witness, committed perjury during the trial of this matter. This issue was not presented to the court of appeals, and petitioner states that his purpose in raising it here for the first time is to protect his rights in a future *habeas corpus* proceeding. Such factual disputes are not properly raised in a petition for certiorari. This argument should be directed to the district court in a motion for a new trial based upon newly discovered evidence.

4. Petitioner Quesada next contends (Quesada Pet. "D") that the court erred in admitting against him certain statements made by Castrillon and Avalos. He claims that those statements concerned a separate conspiracy and could not properly be admitted in his trial. He further asserts that the testimony went beyond the overt acts pleaded in the indictment and constituted a variance between the indictment and the proof of the conspiracy.

The evidence introduced at trial showed that Castrillon and Avalos made a purchase of heroin from Quesada and Inchaustegui in the course of the conspiracy charged to Quesada and his co-defendants. This transaction became the basis for a separate indictment against Castrillon and Avalos. But the evidence also showed that Avalos and Castrillon were actively engaged as co-conspirators in the Quesada heroin marketing conspiracy, although they were not so named in that indictment. Their statements therefore were admissible against Quesada.

The sale of heroin to Avalos and Castrillon was not alleged in the indictment as an overt act of the Quesada conspiracy, but the government is not limited to the overt acts pleaded in demonstrating a conspiracy. It may prove other acts of the conspirators occurring during the course of the conspiracy. *United States* v. *Perez,* 489 F. 2d 51, 70 (C.A. 5). As the court below properly found (Flores Pet. App. 7-8), the separate indictment and trial of Avalos and Castrillon did not demonstrate that they were unavailable to Quesada as witnesses.

5. Petitioner Flores, a foreign national, contends (Flores Pet. 9-10) that the methods by which he was detained in a foreign country and transported to the United States constituted a denial of due process of law and the protection of the Fourth Amendment, thereby depriving the district court of personal jurisdiction over him. Petitioner contends that he was forcibly abducted from Venezuela by United

States and foreign agents and thereafter brought to this country in order to stand trial. Flores asserts (Flores Pet. 6) that he was detained by Venezuelan authorities as he was about to board a flight to another country. He was subsequently placed aboard the aircraft which brought him into the jurisdiction of the United States by three Venezuelan police officers and a federal agent. One of the Venezuelan officers and the agent accompanied him on the flight to Puerto Rico, where he was arrested. According to his own account, petitioner was compelled to leave Venezuela against his will by agents of that government. His forcible expulsion cannot be styled a kidnapping absent any evidence showing that these agents acted without authorization from their government. On its face, Flores' detention required the active cooperation and assistance of the Venezuelan government.

Even if Flores' involuntary departure were considered kidnapping, the conditions of his abduction would not deprive the court of personal jurisdiction over him. It is well-settled that the manner in which a defendant is brought within the court's jurisdiction does not require the court to divest itself of jurisdiction over him, except in the most extreme and outrageous circumstances. As this Court said in *Frisbie* v. *Collins,* 342 U.S. 519, 522 (footnote omitted):

> [T]he power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." * * * [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.

One case has suggested that this rule would be relaxed upon detection of a pattern of governmental complicity in the cruel, brutal and inhuman treatment of a defendant by foreign agents. *United States* v. *Toscanino,* 500 F. 2d 267 (C.A. 2). But nothing in the instant case has shown the outrageous conduct by law enforcement officials which would be necessary to bar the government from prosecuting Flores on due process grounds. *United States ex rel. Lujan* v. *Gengler,* 510 F. 2d 62 (C.A. 2). Rather, the allegations of the petition demonstrate that Flores was not subjected to treatment harsher than that incident to any custodial detention.

The decision of the court of appeals on this point does not conflict with the decision of any other court of appeals and presents no issue warranting review by this Court.

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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